STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 1999
v	No. 207168 Oakland Circuit Court
RONALD H. DAVIS, Defendant-Appellant.	LC No. 97-151458 FC

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). He was sentenced to concurrent terms of eighteen to forty-five years' imprisonment for each conviction. He appeals as of right and we affirm.

I

Defendant first argues that the prosecutor improperly questioned prospective jurors during voir dire which deprived him of his right to a fair trial. Defendant, however, failed to object at trial to the allegedly improper remarks. Appellate review of assertedly improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

The prosecutor's questions during voir dire were proper for the purpose of determining whether the prospective jurors would adhere to the law in reaching a verdict. The questions concerning the likelihood that a domestic violence crime would occur in private were in response to the indication by one juror that he would "need something beyond just the word of somebody" in order to convict a defendant. The prosecutor was entitled to determine whether a prospective juror would adhere to the rule of law that the testimony of a criminal sexual conduct victim need not be corroborated. MCL 750.520h; MSA 28.788(8); *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986). The remaining questions cited by defendant were asked to determine whether the jurors would require the

victim to "fight back." These questions were proper because a victim of criminal sexual conduct "need not resist the actor." MCL 750.520i; MSA 28.788(9). Accordingly, there was nothing improper about the prosecutor's questions.

II

Defendant next contends that African-Americans were underrepresented in his jury array, and that he was denied his constitutional rights to equal protection of the law and to an impartial jury drawn from a fair cross section of the community where only two African-American jurors were impaneled. This Court reviews de novo questions of systematic exclusion of minorities from venires. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

At the close of voir dire examination, defense counsel indicated his satisfaction with the jury. After the jury was impaneled and excused for the day, but before it was sworn, defense counsel objected to the prosecutor's use of a peremptory challenge to exclude an African-American female juror. The prosecutor explained that he excused this juror because of her failure to make eye contact and because she lived where the crime occurred. The trial court ruled that there was no discriminatory pattern and that the peremptory challenge was proper given the prosecutor's explanation. Here, defendant did not challenge the jury on the bases he raises on appeal until after it was impaneled and sworn because defendant did not raise these issues until his motion for a new trial. Thus, his challenge has not been advanced in a timely manner. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

Moreover, defendant has failed to create a factual record to support his claim. Defendant has presented absolutely no evidence to support a claim that the number of African-Americans in venires from which Oakland County juries are selected is not fair and reasonable in relation to the number of African-Americans in the community, and that any underrepresentation of African-Americans is due to systematic exclusion. *Hubbard*, *supra* at 473. Additionally, there is no evidence of any intentional discrimination in violation of the Equal Protection Clause. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302; 553 NW2d 377 (1996). Defendant's bare allegation that African-Americans are "automatically excluded" from jury participation in Oakland County is insufficient to establish a prima facie violation of either the fair-cross-section or the equal protection claims.

III

Next, defendant argues that the trial court abused its discretion in admitting evidence of other bad acts in violation of MRE 404(b). However, defendant has forfeited this issue for appellate review, either by failing to object at trial to the admission of the allegedly improper evidence, or by objecting on a different ground from that raised on appeal. MRE 103(a)(1). The standard of review concerning unpreserved, nonconstitutional error is that the defendant must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 774; ___ NW2d ___ (1999); *People v Grant*, 445 Mich 535, 548-550; 520 NW2d 123 (1994).

After careful review of the record, we are convinced that the challenged testimony was admitted in each instance not as improper evidence of defendant's character to show action in conformity therewith, MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998), but for the proper purpose of rebutting defendant's theories that the victim, his ex-wife, consented to sex and that she had a revenge motive. Thus, defendant has not shown "plain error" and the issue is forfeited.

IV

Defendant next argues that the trial court abused its discretion in excluding evidence that the victim, a seamstress, had failed to timely complete work on a wedding dress belonging to a member of defendant's family; that defendant was forced to "steal" the dress from the victim; and that, after this incident, the victim made statements that indicated a desire to "get even" with defendant and his family. The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We conclude that the trial court properly excluded this evidence on the basis of MRE 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

While arguably marginally relevant to the issue of the victim's motive to lie, the trial court properly determined that the probative value of the evidence concerning the wedding dress was substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Considering that defendant was permitted to present evidence that the victim had made specific statements showing her motive to seek revenge and to lie, the trial court properly determined that introduction of the wedding dress evidence would be cumulative and would constitute a waste of time. Therefore, the trial court did not abuse its discretion in excluding this evidence.

V

Defendant next contends that the trial court abused its discretion in refusing to allow him to question his brother regarding a prior false rape accusation allegedly made by the victim.

Defendant is correct in his assertion that Michigan's rape-shield statute, MCL 750.520(j); MSA 28.788(10), does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984); *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). However, in order to justify introduction of evidence of the victim's prior false accusations of rape, the defendant is obligated initially to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted. *Hackett*, *supra* at 350-351; *Williams*, *supra* at 273. In

his offer of proof, the defendant is required to "offer . . . concrete evidence to establish that the victim had made a prior false accusation" of rape. *Id*.

Here, defendant did not make any offer of proof concerning the proposed testimony. He certainly did not offer any evidence—for example, by questioning the victim herself—that she had made any prior false accusation of rape. Rather, as was the case in *Williams*, *supra* at 273-274, defense counsel "merely wished to engage in a fishing expedition" in hopes of being able to show, through defendant's brother, that the victim had made a prior accusation of rape and that the accusation was false. Because defendant failed to make an offer of proof showing that a prior false accusation was made, the trial court did not abuse its discretion in excluding the proposed testimony. *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993); *Williams*, *supra* at 273-274.

VI

Lastly, defendant contends that his convictions of two counts of first-degree criminal sexual conduct, one count representing vaginal penetration and the other representing anal penetration, constitute multiple punishment for a single offense in violation of the Double Jeopardy Clauses of the state and federal constitutions.

Defendant did not raise this issue below. The standard of review for a forfeited constitutional error is that a defendant must show a plain error that affected substantial rights. *Carines*, *supra* at 764. There is no plain error here because defendant was not twice placed in jeopardy for a single offense. The victim testified that defendant, while brandishing a knife, penetrated her several times, both vaginally and anally. "In interpreting the first-degree criminal sexual conduct statute, Michigan courts have consistently held that the Legislature intended to punish separately each criminal sexual penetration." *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992). Because there was evidence of at least two separate and completed acts of penetration, defendant's convictions of two counts of first-degree criminal sexual conduct did not violate the constitutional prohibition against double jeopardy. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage